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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000447-MR

JOSEPH WOODROW RASSMAN — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 1995-CI-002093

JANET SUE RASSMAN — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, and REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, GARDNER, AND KNOPF, JUDGES.

KNOPF, JUDGE: Janet and Joseph Rassman were married in September 1995. About ten (10) weeks later, they separated, and Joseph filed a petition for divorce. Soon thereafter they reconciled and resumed cohabitation, but in February 1996 they parted again. Once again they reconciled. Then, in July 1996, they separated for a third time and have since remained apart. Janet and Joseph had no children together. At the time of their final separation, Joseph was seventy (70) years old. He was retired from employment and derived his income from social security benefits

and from a Teamsters' Union pension. Janet was fifty-four (54) years old. Shortly before the parties married, she had resigned from a position at a nursing home. At the time of these proceedings, she was unemployed and had recently undergone surgery, which, she claimed, limited her ability to work.

On December 11, 1995, immediately after the couple's first separation, Joseph filed a petition for divorce. A separation agreement, executed that day, accompanied his petition. Due to the parties' reconciliations, the matter did not come before the trial court until October 1996, by which time the status of the separation agreement had grown doubtful. By that time, too, disputes had arisen concerning Janet's entitlement to maintenance and Joseph's obligation to pay a portion of Janet's medical bills. Joseph now appeals from the trial court's January 21, 1997, decree, which attempted to resolve these matters.

Joseph first maintains that the trial court abused its discretion by awarding Janet $2,000.00 as lump-sum maintenance. He insists that Janet failed to demonstrate that she is incapable of providing for herself. He also maintains that $2,000.00 is an excessive amount given the brief duration of the marriage. Notwithstanding these considerations, we are persuaded that the maintenance award was proper.

KRS 403.200 vests the trial court with broad discretion to award maintenance to either spouse provided that the recipient lacks both sufficient property and sufficient earning capacity to

provide for his or her reasonable needs. The same statute further provides that "[t]he maintenance order shall be in such amounts and for such periods of time as the court deems just." In making this determination the court is to consider all relevant factors, such as the financial resources of the parties; the recipient's employment prospects, including her eligibility for additional education or vocational training; the standard of living established during the marriage; the marriage's duration; and the recipient's age and health. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977).

Here, the trial court found that Janet was eligible for temporary maintenance because she did not have sufficient property to provide for her needs and was unemployed. Furthermore, the trial court ruled that $2,000.00 was a reasonable amount in light of these facts: that Janet had brought approximately that amount of money to the marriage; that her age and post-operative condition were apt to delay her return to suitable employment; and that Joseph's income, his freedom from debt, and his substantial savings would enable him to pay that amount without undue hardship. Although, as Joseph notes, the marriage proved to be a brief one, we believe the trial court was within its discretion in relying on the factors just listed. The trial court also noted that Janet had given up steady, long-term employment in reliance on Joseph's promise that he would take care of her. Janet could therefore reasonably be deemed entitled to his help with becoming reestablished in a job.

Joseph next argues that the trial court erred by ordering him to pay nearly two-thirds (2/3) of Janet's medical bills. Those bills, which totaled almost $13,000.00, were for surgery Janet underwent in August 1996, after she and Joseph had separated for the last time. Joseph maintains that he cannot legally be held liable for Janet's post-separation debts. In thus asserting, he relies on KRS 404.040, which limits a husband's potential liability "for any debt or responsibility of the wife contracted or incurred before or after marriage, . . ."

Joseph's reliance on KRS 404.040 is misplaced. By its own terms, that statute applies only to debts incurred before or after marriage, but Janet's medical bills arose during the marriage. Furthermore, KRS 404.040 predates Kentucky's adoption, in 1972, of no-fault divorce. Our domestic relations laws underwent thorough revision at that time, rendering application of KRS 404.040 to this situation inappropriate. *See* Automobile Club Ins. Co. v. Lainhart, Ky. App., 609 S.W.2d 692 (1980) (dissenting opinion by Judge Breetz).

Under our current domestic relations laws (KRS Chapter 403),

> [d]ebts accrued subsequent to separation, but before entry of a divorce decree are rebuttably presumed to be marital debts.

Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 445 (1992) (citing Daniels v. Daniels, Ky. App., 726 S.W.2d 705 (1986)).[1]

[1] We note that there is earlier precedent from this Court holding, to the contrary, that, unlike assets,

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Accordingly, Janet's medical expenses, like other property acquired during the marriage, are subject to the provisions of KRS 403.190. That statute requires the trial court to determine, first, whether those debts, or any portion of them, should be included in the marital estate, and if so how they might justly be divided between the parties.

Here, the trial court apparently deemed the entire debt to be marital and divided it in proportion to the parties' most recent incomes. While we believe that this result was within the trial court's discretion under KRS 403.190, for reasons to be explained below, we are concerned that the court's method of arriving at this result contravened that statute. We are obliged, therefore, to vacate this aspect of its decree and to remand for additional proceedings.

Our fault with the trial court's resolution of this issue is occasioned by its handling of the separation agreement which the parties executed in December 1995, when Joseph first filed his petition for dissolution. Among its provisions, this agreement included Janet's express waiver of any claim to maintenance or to Joseph's contribution to her post-petition debts. The agreement also provided that it constituted a complete settlement between the parties and could be modified only by means of a writing signed by both of them. At the

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liabilities acquired during a marriage are not presumptively marital. O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980); Bodie v. Bodie, Ky. App., 590 S.W.2d 895 (1979). This conflict is not relevant here, however, where the important consideration is simply that, under current divorce law, debts existing at the time of divorce are subject to the general principles of property division as provided in KRS 403.190.

October 1996 and January 1997 hearings in this matter, both parties expressed their understanding that this agreement had been rescinded by their subsequent reconciliations, and was therefore voided. Nevertheless, in its final decree, the trial court characterized the separation agreement as a "partial" one, found it "not to be unconscionable," and incorporated it "as if fully stated" in the judgment. Not surprisingly, Joseph complains that the trial court's *sua sponte* resurrection of the separation agreement was erroneous and that the purported incorporation of the defunct agreement into the judgment renders the decree incoherent. We agree.

Courts, of course, are not to disregard properly executed and conscionable separation agreements. Brown v. Brown, Ky., 796 S.W.2d 5 (1990). However, where a couples' attempt to reconcile following execution of such an agreement clearly manifests a mutual intent to nullify the agreement, the agreement's provisions become "void for all purpose[s and t]he agreement is not revived by a subsequent separation." Peterson v. Peterson, Ky. App., 583 S.W.2d 707, 710 (1979).

As the record in this case makes clear, the parties intended to nullify their December 1995 agreement. Thus, even though many of the agreement's provisions are not apt to be controversial (such as those acknowledging Joseph's non-marital interest in the marital residence and in two vehicles, and the parties' division of household personalty), and even though they addressed matters which the decree, to be complete, needed to

resolve, those provisions were nevertheless void. The trial court's attempt to perfect the decree by incorporating them was clearly erroneous. This is so not only because of the other provisions in the decree, noted above, which are inconsistent with the trial court's resolution of the maintenance and debt issues. It is also because Janet's medical expenses, if found to be marital, would significantly alter the marital estate, as it existed at the time of the agreement. Thus, the trial court must reconsider the conscionability of the agreement in light of the parties' changed circumstances. KRS 403.190.

In sum, therefore, although we agree with Janet that apportionment of her medical expenses is not precluded by KRS 404.040, we are nevertheless persuaded that the analysis required by KRS 403.190 prior to deciding whether and how to apportion those expenses has not yet been properly performed. Accordingly, we vacate those portions of the Kenton Circuit Court's January 21, 1997, decree pertaining to property settlement, including the purported division of Janet's medical debts, and remand for additional proceedings. The trial court is instructed to entertain arguments by the parties concerning the application of KRS 403.190 to their situation and to frame its findings and conclusions accordingly.

ALL CONCUR.

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